Docket No. 89-1784

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and KERWICK & CURRAN, INC.,

Petitioners,

v.

BEN COOPER, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF IN REPLY

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June 12, 1990

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POINT I

RESPONDENT'S CONTENTION THAT THE DECISION BELOW IS CONSISTENT WITH *MARATHON* IGNORES THE SUPREME COURT'S RATIONALE

Respondent's argument in Point I of its opposition brief merely tracks the reasoning of the court below, offering no further explanation for its conclusion that the controversy in this case is a "core" matter. Respondent argues that the decision below is "entirely consistent" with this Court's pronouncement in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In effect, Respondent dismisses *Marathon* on the sole basis that it involved a pre-petition controversy. Yet Respondent's analysis ignores this Court's rationale in *Marathon* which established a dichotomy between the two types of claims related to and arising under bankruptcy proceedings (i.e., private rights as distinguished from rights core to the federal bankruptcy power).

In *Marathon*, the Court gave no indication that the timing of an underlying contract's formation or a claim arising therefrom would govern whether a matter is deemed core or non-core. While disputes arising from post-petition contracts may or may not have a greater impact on a bankruptcy estate than those arising from pre-petition contracts, *Marathon* and its progeny dictate that one examine the nature of a claim to determine whether it is core. The matter at issue, involving ordinary state law contract claims, concerns only private rights. Under *Marathon* such controversies are not core.

POINT II

THE EIGHTH CIRCUIT'S RECENT DECISION CREATES FURTHER UNCERTAINTY AMONG THE CIRCUITS ON THE CRITICAL ISSUE LEFT UNANSWERED IN *GRANFINANCIERA*

Respondent's discussion concerning the power of a bankruptcy court to conduct a jury trial is limited to a defense of the Second Circuit's ruling in the case at bar and a criticism of the Eighth Circuit's ruling in *In Re United Missouri Bank of Kansas City, N.A.*, No. 89-2981, 1990 WL 48555 (8th Cir. April 23, 1990) (to be reported at 901 F.2d 1449).[1] Respondent does not dispute the fact that there is a true difference among the circuits, a difference which is clearly highlighted by the Eighth Circuit's comments in *United Missouri Bank*. Respondent is, nevertheless, unwilling to concede that the split between the Second Circuit and the Eighth Circuit on the jury trial issue would alone consitute a compelling reason for the granting of certiorari.

Where the circuit courts have rendered conflicting decisions on issues of considerable moment, especially on matters that should be treated consistently throughout the United States, certiorari should be granted. *See McElroy v. United States*, 455 U.S. 642, 643 (1982); *Marks v. United States*, 430 U.S. 188 (1977); *City of New York v. Saper*, 336 U.S. 328, 329 (1949) (inconsistent application and administration of Bankruptcy Act warranted grant of certiorari). In this controversy, there can be little doubt as to the constitutional significance of the question which is presented. Indeed, in *Granfinanciera, S.A. v. Nordberg*, ____ U.S. ____, 109 S.Ct. 2782 (1989) the Court noted the need for addressing the jury trial issue. The recent pronouncement by the Eighth Circuit further underscores the uncertainty that exists on the question of whether bankruptcy judges can conduct jury trials.

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[1] The Eighth Circuit's decision is reprinted in full in the Appendix beginning at A-38.

The Circuit Court's decision in *United Missouri Bank*, focused on the flaws in the Second Circuit's ruling in the case at bar. The Eighth Circuit addressed the specific issue of whether Congress had either expressly or impliedly empowered the bankruptcy courts to conduct jury trials in the 1984 Bankruptcy Amendments to the Federal Judgeship Act (the "BAFJA"). The court in *United Missouri Bank* held that bankruptcy judges lack authority to conduct jury trials. *Id.* at A-43. In so holding, the Eighth Circuit expressly disapproved and rejected the Second Circuit's decision below in this case.

In its analysis, the Eighth Circuit first noted that the "language of the 1984 Act does not grant jury trial authority." It then turned to the legislative history of the BAFJA for "evidence that Congress intended to grant that authority." It found that no such intention was expressed. *Id.* at A-43-44. The court also rejected the negative inference that some courts have drawn from the language of 28 U.S.C. § 157(b)(5) which specifically directs that personal injury and wrongful death actions be tried by a jury in the district court. Finding the Second Circuit's analysis in this case to be lacking, the Eighth Circuit commented as follows:

> The Second Circuit's conclusion is premised upon the reasoning that since Congress could not deprive a private litigant of his Seventh Amendment right by designating an Article I forum to hear subject matter pertaining to private rights, Congress intended that the Article I forum have the authority to conduct jury trials. We find this to be a faulty syllogism. We think it more plausible that Congress simply intended to transfer all proceedings relating to the bankruptcy estate to the sole jurisdiction of the bankruptcy court without regard to whether a party was entitled to a jury trial, or which forum would conduct the trial.

Id., 1990 WL 48555 at A-45 (footnote omitted). Following *United Missouri Bank* there can be no question that the circuits squarely disagree on the significant constitutional question presented in this case.

Respondent's justification of the Second Circuit's decision below is that it is "the only way to reconcile this Court's holding in *Granfinanciera* with Congress' language expressed in 28 U.S.C. §§ 151 and 157. . ." To conclude that they must be reconciled in the context of a bankruptcy court trial, however, is to assume that when Congress enacted the BAFJA it had the prescience to realize how this Court would later rule in *Granfinanciera*. Quite clearly, that was not the case.

CONCLUSION

The jury trial issue left unresolved in *Granfinanciera*, which has become the focus of numerous subsequent decisions and controversies, will remain in a state of uncertainty without further elaboration from the Court. Certiorari should be granted.

Respectfully submitted,

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June 12, 1990

APPENDIX

IN RE UNITED MISSOURI BANK OF KANSAS CITY, N.A., Petitioner,

89-2981.

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

April 23, 1990

Before LAY, Chief Judge, BOWMAN and BEAM, Circuit. Judges.

LAY, Chief Judge.

*1 The central issue we confront is whether a bankruptcy judge acting under the Bankruptcy Amendments and Federal Judgeship Act 1984, Pub.L. No. 98-353, 98 Stat. 333 (1984 Act), has the statutory and constitutional authority [FN1] to conduct jury trials in a core proceeding in bankruptcy. We hold, contrary to the bankruptcy court [FN2] and the district court, [FN3] that a bankruptcy judge lacks the statutory authority to conduct jury trials in an action alleging a preferential transfer between the debtor and a third party creditor.

BACKGROUND

The bankruptcy trustee for the Kroh Brothers Development Company bankrupt estate brought an adversary action in the bankruptcy court against United Missouri Bank of Kansas City (the Bank), seeking recovery of alleged preferential transfers of approximately $4 million plus interest. The Bank had not previously participated in the bankruptcy proceeding or filed a claim against the Kroh Brothers estate. Following the Supreme Court's decision in Granfinanciera, S.A. v. Nordberg, 109 S. ct. 2782 (1989), which recognized a seventh amendment jury trial right in certain bankruptcy proceedings, the Bank filed a demand for a jury trial, along with a motion in the district court to withdraw the case from the bankruptcy court. [FN4] The bankruptcy judge found the jury trial demand untimely but granted the motion under Fed.R.Civ.P. 39(b), and ruled that the bankruptcy judge had the statutory and constitutional authority to conduct and preside over the jury trial. [FN5] The district

court denied the Bank's motion to withdraw the proceeding, agreeing that the bankruptcy judge could conduct the jury trial. The Bank then filed a Petition for Writs of Mandamus and Prohibition in this court, seeking to restrain the district and bankruptcy courts from allowing the bankruptcy judge to conduct the jury trial in the bankruptcy court.

DISCUSSION

In deciding the issue before us we focus on two recent opinions: the Supreme Court's decision in Granfinanciera, 109 S.Ct. 2782; and the recent decision of the Second Circuit in Ben Cooper, Inc. v. The Insurance Co. of Pennsylvania (In re Ben Cooper, Inc.), No. 89-5026, 1990 Westlaw 11027 (2d Cir., Feb. 7, 1990), which held that a bankruptcy judge has both the statutory and constitutional authority to conduct a jury trial in core proceedings. [FN6] In all due respect to our sister circuit, we must disagree with the Second Circuit's holding that a bankruptcy judge has the statutory authority to conduct jury trials.

A review of the Granfinanciera decision is critical to an understanding of our analysis in this case. In Granfinanciera, the trustee for the Chase & Sanborn bankrupt estate sought to recover alleged fraudulent transfers of approximately $1.7 million plus interest from the defendant, Granfinanciera. The trustee filed the complaint in the district court, which referred the action to the bankruptcy court. The defendant, who had not filed any claims against the bankruptcy estate, demanded a jury trial, which the bankruptcy court denied. Granfinanciera, 109 S.Ct. at 2787.

*2 The Supreme Court found Granfinanciera had a seventh amendment right to a jury trial on the fraudulent transfer claim. The Court found that fraudulent transfer actions were historically brought in courts of law before juries, id. at 2790-94. [FN7] Since, under the 1984 Act, Congress had placed fraudulent transfers within the bankruptcy court's jurisdiction, see 28 U.S.C. § 157(b)(2)(4) (Supp. V. 1987) (bankruptcy court may "hear and determine" fraudulent transfer actions), the Court considered

whether Congress could preempt jury trial rights by assigning a claim to a tribunal that traditionally did not conduct jury trials. "The sole issue before us is whether the Seventh Amendment confers on petitioners a right to a jury trial in the face of Congress' decision to allow a non-Article III tribunal to adjudicate the claims against them." 109 S.Ct. at 2795. [FN8] The Court concluded that Congress' ability to block seventh amendment jury trial rights by assigning a claim to an Article I tribunal is limited to those disputes involving "public rights." Since a fraudulent transfer action involves private, common law rights, the Court concluded Granfinanciera was entitled to a jury trial, notwithstanding Congress' placement of the claim in a forum that traditionally did not conduct jury trials. Id. at 2795-2802. Thus, a party to an adversary proceeding in bankruptcy may have a seventh amendment right to a jury trial before some tribunal, and since there has been no claim filed against the Kroh bankruptcy estate, Granfinanciera controls here.

A. Historical Overview

With the Granfinanciera decision as the background, we start our analysis with a historical review of the authority of bankruptcy courts. Article I courts are courts of special jurisdiction created by Congress that cannot be given the plenary powers of Article III courts. Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). The authority of the Article I court is not only circumscribed by the constitution, but limited as well by the powers given to it by Congress. See Ex parte Bakelite Corp., 279 U.S. 438, 449 (1929); see also Plastiras v. Idell (In Re Sequoia Auto Brokers, Ltd., Inc.), 827 F.2d 1281, 1284 (9th Cir. 1987) ("Congress vests bankruptcy courts with their jurisdiction and their authority has no 'inherent' source"). Although we view this issue in light of the 1984 Act, the historical role of bankruptcy judges illustrates an absence of legislatively authorized power to conduct a jury trial on preferential transfers.

Under the Bankruptcy Act of 1898, see Act of July 1, 1898, ch. 541, 30 Stat. 544, the bankruptcy courts [FN9] were vested

with "summary" jurisdiction over controversies involving property within the actual or constructive possession of the bankruptcy court. Matters falling within a bankruptcy court's summary jurisdiction were equitable matters that did not involve jury trials. See Katchen v. Landy, 382 U.S. 323, 336-37 (1966). Plenary matters, involving disputes over property held by a third person, were heard in the district court, or with the consent of the parties, in the bankruptcy court. See Marathon Pipe Line Co., 458 U.S. at 53. Traditionally, when a claim of preferential transfer was not presented in the bankruptcy proceeding and arose from a plenary action brought by the trustee in federal court the claim was not considered "integral to the restructuring of debtor-creditor relations" and was not deemed to arise "as part of the process of allowance and disallowance of claims." Granfinanciera, 109 S.Ct. at 2799. As Granfinanciera makes clear, bankruptcy courts were statutorily vested with jurisdiction at law as well and could "oversee plenary proceedings." Id. at 2798 (citing Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 454 n.11 (1977)).

*3 Historically, jury trials under the 1898 Act were not held in bankruptcy court, with two narrow statutory exceptions involving involuntary petitions and the dischargeability of debts. See Gibson, Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment, 72 Minn. L. Rev. 967, 972-73 (1988). Until 1973, there was no indication as to which forum was to conduct these jury trials. The bankruptcy rules promulgated by the Judicial Conference in 1973 required jury trials on dischargeability claims to be held in the district court unless a local rule provided otherwise. See Fed. Bank. R. 409(c), reprinted in 12 Collier on Bankruptcy (14th ed.1976). Jury trials involving involuntary petitions were to be conducted by the bankruptcy judge unless trial was demanded before the district court or a local rule required jury trials in the district court. See Fed. Bank. R. 115(b), reprinted in 12 Collier on Bankruptcy (14th ed. 1976). Thus, there was no statutory authority for bankruptcy judges to conduct jury trials under the 1898 Act, and the procedural rules governing the bankruptcy courts did not grant this authority until 1973.

In 1978 Congress overhauled the bankruptcy system and enacted sweeping substantive and procedural changes. See Bankruptcy Reform Act, Pub.L. No. 95-598, 92 Stat. 2549 (1978). The 1978 Act conveyed jurisdiction over all "civil proceedings arising under title 11 or arising in or related to cases under title 11," and placed that authority in the bankruptcy courts. 28 U.S.C. § 1471(b), (c) (1982). Jury trial rights as they existed prior to the 1978 Act were preserved. See 28 U.S.C. § 1480 (1982). Although section 1480 did not expressly provide authority for bankruptcy judges to conduct jury trials, it is apparent from the extremely broad grant of jurisdiction and the legislative history that Congress intended bankruptcy courts exercise that authority. [FN10] The Supreme Court, however, held this broad grant of jurisdiction unconstitutional. Marathon Pipe Line Co., 458 U.S. 50.

Congress responded to the Marathon decision with the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. No. 98-353, 98 Stat. 333 (1984 Act). [FN11] The 1984 act established a bifurcated method of adjudicating claims in bankruptcy court, and allocating the bankruptcy court's jurisdiction. If a claim is a "core" proceeding, the bankruptcy judge may "hear and determine" the claim and "enter appropriate orders and judgments," subject to review by the district court. See 28 U.S.C. § 157(b)(1). In non-core proceedings, the bankruptcy judge may only "hear" the case, and submit proposed findings of fact and conclusions of law to the district court, which retains the authority to enter a final judgment. See 28 U.S.C. § 158(c)(1). A bankruptcy judge may, with the consent of the parties, "hear and determine" a non-core proceeding, and enter appropriate orders and judgments. 28 U.S.C. § 158(c)(2). The statutory process governing non-core proceedings, i.e., the bankruptcy court submitting proposed findings of fact and conclusions of law to the district court, is in our judgment incompatible with any implication that Congress has provided the bankruptcy court the authority to try jury cases in non-core proceedings. [FN12] Bankruptcy judges now may only "exercise the authority conferred under" the 1984 Act. 28 U.S.C. § 151 (Supp. V 1987). There is no specific grant of authority allowing or prohibiting bankruptcy judges from conducting jury trials, although

jury trial rights are again preserved. See 28 U.S.C. § 1411 (jury trial right with respect to personal injury and wrongful death claims unaffected). Congress, however, vests the bankruptcy judges with their authority, see In Re Sequoia Auto Brokers, Inc., 827 F.2d. at 1284, and as the preceding historical review suggests, jury trial authority in bankruptcy courts has been, at times, contemplated. Therefore, we review the relevant statutes for an indication that Congress expressly granted bankruptcy judges the authority to conduct jury trials, or otherwise intended that they exercise that authority. Our purpose at all times is to determine the intent of Congress. United States v. Jones, 811 F.2d 444, 447 (8th Cir. 1987).

B. Express Authority

*4 The focus of much of the debate over jury trials under the 1984 Act is 28 U.S.C. § 157, which grants bankruptcy courts the authority to take certain actions in certain cases. [FN13] As the Second Circuit acknowledged, the 1984 Act, and in particular section 157, does not contain any specific or express language granting a bankruptcy judge authority to conduct jury trials. See In Re Ben Cooper, No. 89-5026, 1990 Westlaw 11027 at 19. [FN14] The references to jury trials in the 1984 Act address only the authority of the district court. See 28 U.S.C. § 157(b)(5) (1988) (personal injury and wrongful death claims shall be tried in district court). Congress has previously provided express statutory authority to conduct jury trials to a non-Article III tribunal, see 28 U.S.C. § 636(a)(3), (c)(1) (1982) (statutory authority of magistrates to conduct jury trials in certain cases), and thus, we believe, is aware of the language necessary to expressly grant that authority. [FN15] The language of the 1984 Act does not grant jury trial authority.

C. Implied Authority

Since the language of the 1984 Act does not expressly grant jury trial authority, we look to the legislative history for evidence that Congress intended to grant that authority. Blum v. Stenson, 465 U.S. 886, 896 (1984); West v. Bergland, 611 F.2d 710, 723 (8th Cir. 1979), cert. denied, 449 U.S. 821 (1980). The

bankruptcy judge concluded that a "comprehensive reading" of sections 151, 157 and 1411 of title 28 demonstrated Congress' implicit intent to grant jury trial authority. Some courts that have found implied authority for bankruptcy courts to conduct jury trials have relied on the limitations placed on the district court's authority to conduct jury trials. See 28 U.S.C. § 157(b)(5) (personal injury tort and wrongful death actions tried by jury in the district court). This limitation on the forum for these specific actions suggests to some courts that all other jury trials are to be held in the bankruptcy court. See Perino v. Cohen (In Re Cohen), 107 Bankr. 453, 455 (S.D.N.Y. 1989) (statute contemplates that jury trials are to be held in bankruptcy court since only personal injury and wrongful death jury trials are in the district court); Wolfe v. First Federal Savings & Loan Assoc. of Paragould (In Re Wolfe), 68 Bankr. 80, 87-88 (Bankr. N.D. Tex. 1986) (specific limitation in section 157 does not implicitly prohibit bankruptcy court from conducting jury trials); Morse Elec. Co. v. Logicon, Inc. (In Re Morse Elec. Co.), 47 Bankr. 234, 238 (Bankr. N.D. Ind.1985) (bankruptcy court not prohibited from conducting jury trial unless claim involves wrongful death or personal injury).

We reject this argument as contrary to Congress' intent. The legislative history of the 1984 Act, while not particularly illuminating on this issue, does not support this argument. The possibly relevant legislative history reveals only a debate over whether to vest bankruptcy judges with Article III status. See 130 Cong. Rec. H6240-48 (Mar. 21, 1984); 129 Cong. Rec. S9975 (Apr. 27, 1983). There is no discussion in the legislative record that suggests Congress intended to grant bankruptcy judges the authority to conduct jury trials. [FN16]

*5 Granfinanciera, however, requires that a jury trial be provided in this case. We recognize that although the authority to conduct jury trials is not expressly provided, that authority may still be implied if it is incidental and necessary to make the legislation effective. 2A Sutherland Stat. Const. § 55.04 (1984); see also Phelps Dodge Corp. v. National Labor Relations Bd., 313 U.S. 177 (1941); United States v. Sischo, 262 U.S. 165 (1923). In In Re Ben Cooper, No. 89-5026, the Second Circuit resolved

the statutory authority issue with succinct analysis. It found that the adversary proceeding was a core proceeding for which Granfinanciera required a jury trial and that the authority of bankruptcy judges to conduct jury trials must be implied to reconcile the congressional intent evident in the power granted in the 1984 Act. The Second Circuit reasoned:

> Despite the lack of a specific statutory provision, we nevertheless hold that the bankruptcy courts may conduct jury trials in core proceedings. This is the position taken by the majority of courts which have considered the issue. * * * Our holding rests on two separate but related provisions. The first provision is 28 U.S.C. § 151 (1988) [bankruptcy judge may exercise authority conferred under chapter]. The second provision is § 157(b) which, as stated previously, gives bankruptcy judges the authority to conduct trials and issue final orders in core proceedings. Granfinanciera teaches that such proceedings, if legal in nature, are subject to the Seventh Amendment, but that opinion does not alter Congress' intent that they be heard by a bankruptcy court with authority to issue final orders. Construing the Bankruptcy Code to allow jury trials in the bankruptcy court is the only way to reconcile these various concerns.
>
> In Re Ben Cooper, No. 89-5026, 1990 Westlaw 12027 at 19-20. (citations omitted). [FN17]

The Second Circuit's conclusion is premised upon the reasoning that since Congress could not deprive a private litigant of his Seventh Amendment right by designating an Article I forum to hear subject matter pertaining to private rights, Congress intended that the Article I forum have the authority to conduct jury trials. We find this to be a faulty syllogism. We think it more plausible that Congress simply intended to transfer all proceedings relating to the bankruptcy estate to the sole jurisdiction of the bankruptcy court [FN18] without regard to whether a party was entitled to a jury trial, or which forum would conduct the trial. In fact, it appears Congress did not even consider the need to provide jury trial authority. As the Supreme Court pointed out: "Thus, the 1984 Amendments' denial of the right to a jury trial in preference and fraudulent conveyance

actions can hardly be said to represent Congress' considered judgment of the constitutionality of this change." Granfinanciera, 109 S.Ct. at 2800 n.16. If Congress did not consider the constitutionality of denying jury trials, we doubt if it considered the need to provide for authority for the bankruptcy court to conduct a jury trial.

*6 It is not enough that the implied power is consistent with the legislation from which it is implied. "The power to be implied * * * must be practically indispensable and essential in order to execute the power actually conferred." 2A Sutherland Stat. Const. § 55.03 However, the power to conduct jury trials is not indispensable to bankruptcy judges' ability to execute the authority conferred by the 1984 Act. Bankruptcy judges are vested with fairly broad power to "hear and determine" and "enter appropriate orders and judgments" in core proceedings, but we do not believe this broad grant of authority contemplates that the authority to conduct jury trials is an indispensable power necessary to carry out the authority actually conferred by this section. We note that Congress, at the time of the 1984 Act, was extremely wary of its authority to clothe article I courts with article III powers. See Statement of Sen. Hatch, H.R. Rep. No. 5174, 98th Cong., 2d Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 590, 594. Cf. Griffith v. Oles (In Re Hipp, Inc.), 895 F.2d 1,503, 1518 (5th Cir. 1990) (since Congress intended to limit bankruptcy courts power and jurisdiction under the 1984 Act, court would not imply criminal contempt power where that power was not expressly granted).

We hesitate to reach too far to imply the authority for an article I court to try jury cases involving private rights simply because Congress seeks to introduce a more efficient bankruptcy scheme, see Granfinanciera, 109 S.Ct. at 2801 n.17, especially where congressional and historical support for that authority is lacking. We are likewise guided by the principle that we should "avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative poses no constitutional question." Gomez v. United States, 109 S.Ct. 2237, 2241 (1989). Given the absence of supporting legislative history, and the serious constitutional problems posed by an alternative

interpretation, our interpretation is not only reasonable, but necessary. See, e.g., In Re Hiny, Inc., 895 F.2d at 1509 (where constitutionality of bankruptcy courts exercising criminal contempt authority was questionable, court would construe 1984 Act as not conferring that authority).

We find no statutory authorization afforded bankruptcy judges or courts to conduct jury trials on legal proceedings. Consequently, we do not reach the constitutional issues.

CONCLUSION

The writ of mandamus requiring the district court to withdraw this action from the bankruptcy court pursuant to 28 U.S.C. § 157(d) is hereby granted. The judgment of the district court is vacated. The case is remanded for trial by the district court.

Footnotes

FN1. Although we recognize the grave constitutional problems posed by the issue in this case, we reach only the statutory issue.

FN2. The Honorable Karen See, United States Bankruptcy Judge for the Western District of Missouri.

FN3. The Honorable Howard Sachs, United States District Judge for the Western District of Missouri.

FN4. See 28 U.S.C. § 157(d) (Supp. V. 1987): "The district court may withdraw, in whole or in part, any case or proceeding referred [to the bankruptcy court] under this section, on its own motion or on timely motion of any party, for cause shown."

FN5. We agree with the bankruptcy judge that the Bank has a constitutional right to a jury trial under Granfinanciera. We also find the bankruptcy judge did not abuse her discretion in granting the jury trial motion under Fed.R.Civ.P. 39(b). Cf. Littlefield v. Fort Dodge Messenger, 614 F.2d 581, 585 (8th Cir. 1980) (no abuse of discretion in denying belated request for jury trial).

FN6. The Second Circuit had to decide whether a state law insurance contract claim was a core proceeding and whether the defendant was entitled to a jury trial on its adversary claim under the reasoning of Granfinanciera. After deciding these issues affirmatively, the court then determined that the bankruptcy court had the statutory authority to conduct a jury trial, and that there was no constitutional violation in the delegation by Congeress of jury trial authority to an article I court. In Re Ben Cooper, No. 89-5026.

FN7. The court reached this result by relying in part on the law of preferential transfers, thus suggesting the same result applies to this claim of preferential transfers. See Granfinanciera, 109 S.Ct. at 2790-91 ("There is no dispute that actions to recover preferential or fraudulent transfers were often brought at law in late 18th century England.")

FN8. It is important to distinguish between the issue decided in Granfinanciera and the issue this court decides. The Supreme Court decided the right to a jury trial without deciding which judge, the district court judge or the bankruptcy judge would conduct the trial. In this case, however, we consider only the issue of which judge shall preside at the jury trial.

FN9. The federal district courts were the designated "bankruptcy courts" under the 1898 Act, but the duties of the bankruptcy court were carried out by "bankruptcy referees" (later called "judges"), appointed by the district court. See Act of July 7, 1898, ch. 541, §§ 1(8), 34, 30 Stat. 544, 555.

FN10. See 28 U.S.C. § 1471(c) (bankruptcy courts shall exercise all jurisdiction granted by the 1978 Act); see also H.R. Rep. No. 595, 95th Cong., 1st Sess. 448 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 5973 ("Bankruptcy courts will be required to hold jury trials to adjudicate what are under present law called 'plenary suits,' that is, suits that are brought in State or Federal courts other than bankruptcy courts.") id. at 6400 (the broad grant of jurisdiction to bankruptcy courts allows trial in bankruptcy court of actions that were previously tried in federal or state court). The Supreme Court interpreted

section 1480 as providing the bankruptcy court with authority to conduct jury trials. See Marathon Pipeline Co., 458 U.S. at 55.

FN11. With the enactment of the 1984 Act, 28 U.S.C. § 1480 was repealed. Some courts continued to find jury trial authority by relying in part on Bankruptcy Rule 9015, which was promulgated in 1983, after the Marathon decision. See Gibson, supra, at 988. Rule 9015 prescribed the procedures for jury trials. However, since it was a procedural rule, and could not create substantive rights, Rule 9015 was abrogated in 1987 to eliminate any confusion about its relevance to jury trials in bankruptcy courts. See 9 Collier on Bankruptcy at 9015-1 (15th ed.) (citing Advisory Committee Note on abrogation of Rule 9015).

FN12. See Haden v. Edwards (In Re Edwards), 104 Bankr. 890, 898 (Bankr. E. D. Tenn.1989). Some bankruptcy courts however, have reconciled this language as not being inconsistent with the bankruptcy court's authority to try jury cases in non-core proceedings. See, e.g., Perino v. Cohen (In Re Cohen), 107 Bankr. 453, 455 (S.D.N.Y. 1989) (bankruptcy courts exercise judicial authority in core and non-core proceedings); see also Gibson, supra at 1029-30 (courts concluding authority to conduct jury trials exists but declining to exercise that authority absent consent). We need not discuss this problem, since for purposes of the present case Congress has clearly delineated the issue of preferential transfers to be a core proceeding. 28 § 157(b)(2)(F). We thus view the issue of the bankruptcy court's authority to try jury cases in terms of its jurisdiction granted to "hear and determine" core proceedings.

In taking this view, we make no attempt to decide whether Congress may or may not properly define a preferential transfer dispute such as we have here a "core proceeding." See, e.g., Granfinanciera, 109 S.Ct. at 2800 and n.16.

FN13. This statute provides:

> (b)(1)Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11 or arising in a case under title 11, referred (by the district court) and may enter appropriate

> orders and judgments, subject to review under section 158 of this title. * * * (5) The district court shall order that personal or tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.
>
> (c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.
>
> (2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

28 U.S.C. § 157(b), (c) (emphasis added). Appeals from the orders and judgments of the bankruptcy judge are governed by 28 U.S.C. § 158.

FN14. This fact alone has caused many bankruptcy judges to find that they lacked the statutory authority to conduct jury trials. See, e.g., Hughes-Bechtol, Inc. v. Air Enter., Inc. (In Re Hughes Bechtol, Inc.), 107 Bankr. 552, 571 (Bankr. S.D. Ohio 1989); Howison v. Country Hills Assoc. (In Re W.G.M.C., Inc.), 96 Bankr. 5, 7 (Bankr. D. Me.1989); Weeks v. Kramer, (In Re G. Weeks Sec. Inc.), 89 Bankr. 697, 714 (Bankr. W.D. Tenn. 1988).

FN15. We reject the trustee's argument that the "hear and determine" language of 28 U.S.C. § 157(b)(1) is an explicit grant of authority to conduct jury trials. We find persuasive the reasoning of the court in In Re G. Weeks Sec., Inc., 89 Bankr. at 714: "Congress could easily have expressed its intention that the bankruptcy courts were authorized to conduct [jury] trials. The absence of that positive expression and the presence of statutory language to the contrary * * * makes it clear that Congress did not authorize jury trials in the bankruptcy courts."

FN16. The one statement in the legislative history that arguably supports jury trial authority is, at the same time, too vague and ambiguous to do so. In discussing the powers of bankruptcy judges, Representative Kindness stated: "The bankruptcy judge will conduct the trial, make a recommendation to the district court[.]" 130 Cong. Rec. H6242 (Mar. 21, 1984). This statement was made during the debate over Article III status for bankruptcy judges. Representative Kindness also pointed out that his amendment, to create non-Article III bankruptcy judges which was eventually adopted, was "essentially a legislative enactment of the emergency bankruptcy rule, the model rule that has been in effect, under which the bankruptcy courts have been operating. * * * [The amendment] add[s] the endorsement of the Congress to the emergency rule, the model rule under which the court has been operating[.]" Id. The Emergency Rules were adopted by the Judicial Conference in response to the Marathon Pipeline Co. decision, to provide operating rules for the bankruptcy courts until Congress enacted a new system. The Emergency Rules prohibited bankruptcy judges from conducting jury trials. See Emergency Rule (d)(1)(D), reprinted in 1 Collier on Bankruptcy, § 3.01(1)(b)(vi) (15th ed. 1989). Thus, if anything can be gleaned from this commentary, it is that Congress intended to continue the Emergency Rule's prohibition against bankruptcy judges conducting jury trials.

FN17. We question the Second Circuit's implicit suggestion that the Supreme Court's Granfinanciera opinion contemplated jury trials in the bankruptcy court. See In Re Ben Cooper, No.

89-5026, 1990 Westlaw 11027 at 16 (Granfinanciera court contemplated that its holding would result in jury trials in bankruptcy courts). The Supreme Court, despite Justice White's persuasive challenge, see 109 S.Ct. at 2810-11 (White, J., dissenting), did not even implicitly sanction the authority of the bankruptcy judge to conduct jury trials, leaving that issue open as unnecessary to its decision. Granfinanciera, 109 S.Ct. at 2794-95.

FN18. Justice White argues that Congress not only did just that but had a constitutional right to do so:

> With the historical evidence thus in equipoise—and with the nature of the relief sought here not dispositive either, * * * —we should not hesitate to defer to Congress' exercise of its power under the express constitutional grant found in Art. I, § 8, cl. 4, authorizing Congress "[t]o establish . . . uniform Laws on the subject of Bankruptcies." Congress has exercised that power, defining actions such as the one before us to be among the "core" of bankruptcy proceedings, triable in a bankruptcy court before a bankruptcy judge and without a jury. I would defer to these decisions.

Id. at 2814 (White, J., dissenting) (emphasis added).